



POLICE DEPARTMENT

The
City
of
New York

MEMORANDUM FOR: Police Commissioner

July 5, 2013

Re: Police Officer James Farah
Tax Registry No. 934838
61 Precinct
Disciplinary Case No. 2011 5034

Police Officer Stefano Diomede
Tax Registry No. 934782
61 Precinct
Disciplinary Case No. 2011-5036

The above-named members of the Department appeared me on March 22, 2013, and April 10, 2013, charged with the following:

Disciplinary Case No. 2011-5034

1. Said Police Officer James Farah, assigned to the 61st Precinct, on or about December 31, 2009, at [REDACTED], located in Kings County, did fail to arrest an individual known to this Department for a violation of an active Kings County Criminal Court Order of Protection.

P.G. 208-36, Page 4, Paragraph 7 FAMILY OFFENSE/DOMESTIC VIOLENCE

Disciplinary Case No. 2011-5036

1. Said Police Officer Stefano Diomede, assigned to the 61st Precinct, on or about December 31, 2009, at [REDACTED], located in Kings County, did fail to arrest an individual known to this Department for a violation of an active Kings County Criminal Court Order of Protection.

P.G. 208-36, Page 4, Paragraph 7 – FAMILY OFFENSE/DOMESTIC VIOLENCE

The Department was represented by Beth Douglas, Esq., Department Advocate's Office, and Respondents were represented by Michael Martinez, Esq.

Respondents, through their counsel, entered pleas of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2011 5034

Respondent Farah is found Not Guilty.

Disciplinary Case No. 2011 5036

Respondent Diomede is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Sergeant John Baldino, Police Officer Yuriy Demchenko, and Sergeant Maurice Williams as witnesses.

Sergeant John Baldino

Baldino has been a member of the Department for over 19 years. In October 2005, he was promoted to the rank of sergeant. For about six and a-half years he has been assigned to the Brooklyn South Investigations Unit, where he goes on callouts and conducts investigations for police misconduct.

On December 31, 2009, there were calls from the Demchenko residence located at [REDACTED] in Brooklyn. Respondents assigned to 61 Precinct Sector George, responded to a radio run of a 10-34 (assault in progress), which also came over as a 10-52 (dispute) and involved an order of protection.

Baldino reviewed the 911 tapes and the radio transmissions of those calls [Department's Exhibit (DX) 1]. Based on his review of the radio transmissions, Baldino determined that the 61 Precinct patrol supervisor, Sergeant Williams, communicated with the dispatcher that he was responding to the 10-34 at that location.

Baldino described that Williams then tried to determine where the sectors were. According to Baldino's notes, the dispatcher was trying to raise Sector George for a 10 34, female being assaulted. About two minutes later, the dispatcher raised Sector George and 35 seconds later, also said that there was a 10-52 with an order of protection at that location. Sector George then acknowledged with 10 4, meaning they heard the transmission.

Baldino determined that Respondents Farah and Diomede were assigned to Sector George. Baldino did not know which of the Respondents' voices was heard on the transmission.

Baldino described the next transmissions, where Williams said that he was 10-84, meaning that he arrived at the location. About a minute later, an unknown sector unit put over a transmission for a slow down at the location, but Sector George never acknowledged it.

Baldino explained,

They probably took a response to a 10-34, assault in progress; slow down means to slow down, it is not an extreme emergency. . . . It means to be careful if you respond with light and sirens for safety, yes, and that it's probably not a serious situation at that time.

About eight minutes later, Williams told the dispatcher that it was not a 10 34, it was just a 10-52, a dispute at that location. The dispatcher asked him asked if the 10-34 was one and the same with the 10-52/order of protection, and Williams said it was.

On January 2, 2010, Police Officer Demchenko reported this incident to the Internal Affairs Bureau (IAB). Demchenko reported that the responding officers did not do anything about a dispute [REDACTED] Person A, had with a neighbor, Person B, even though [REDACTED] had an order of protection. Demchenko's complaint generated an IAB log (DX 2x).

A valid order of protection dated December 10, 2009 issued to Person A against Person B had been in effect on December 31, 2009, until February 3, 2010 (DX 3).

On voir dire, Baldino confirmed that the night that the officers and Williams responded, a copy of that order of protection was probably not presented. Baldino believed that, although the order was in effect, Person A had not yet received it. Baldino did not recall if Demchenko mentioned seeing either of the Respondents at [REDACTED] on that evening.

On continued direct examination, Baldino agreed that if a protected party does not have a copy of the order of protection, an officer can verify whether an order of protection exists by having the radio dispatcher or someone at the command run the name of the person that the order is against.

Two complaint reports for harassment were generated on that date: one for Person B and one for Person A (DX 4A and 4B). Respondent Diomede took both reports.

The complaint reports, where Person A is listed as the victim, stated "neighbor confronted him in his lobby following a dispute, causing this c/v [complainant/victim] to be annoyed and alarmed." There is nothing on Person A's complaint report about an order of protection.

In the second complaint report where Person B is listed as the victim, the narrative is exactly the same. On Person B's complaint report there are no specific details as to what occurred. According to Baldino, "The only thing it says is where it happened. It is marked off, lobby and vestibule."

On both complaint reports, nothing is listed for statements made by the "suspect." There is no indication that any questions were asked about an order of protection.

Baldino explained that the basis for charging misconduct was that Respondents were alerted by radio that there was an order of protection. Then once they arrived at the scene, Respondents made no attempt to ask or find out if there was an order of protection. When the officers were interviewed, they said that they did not hear anything about an order of protection.

Baldino was asked what an officer is required to do when told about an order of protection, but a sergeant just gives a direction to prepare cross-complaint reports.

Baldino stated,

You have to go by the order of the sergeant, but when it has an order of protection involved, you really need to do the checks. But if they go by what the sergeant said at the scene, the sergeant is really the one who makes the call. But if they -- you know, if they -- it should have been probably taken a couple of steps further. . . They probably should have made notification to a lieutenant above the sergeant or their commanding officer or maybe made an Internal Affairs Bureau log.

Baldino verified that there are recourses for a member of service if they are given the wrong direction by a supervisor: "They can notify a higher superior officer or make an Internal Affairs Bureau notification if it is misconduct."

Baldino explained to the Court, "When you take a harassment report and an order of protection is involved, they really – that should have came up in the question. There should have been something done."

On cross-examination, Baldino agreed that this job came over the radio as an assault in progress, a priority job. Williams immediately said he was going to respond to it and asked for a rundown to check where the rest of the members of the service were working that day. Respondents were handling a petit larceny, a low-priority job. Generally, sergeants are not assigned jobs, but this sergeant was being proactive.

Because Respondents were handling a job that was a low priority, a petit larceny, they had to respond to the assault in progress, a higher priority. They acknowledged on the radio that they were on their way. For this kind of job, police generally put their lights and sirens on and go through red lights. Baldino did not know how far Respondents were from [REDACTED] when they first got the call, but agreed that the precinct was big. While on their way, a second call, which was acknowledged, came over from dispatch that there was also a 10-52 with an order of protection at the same location. Baldino never substantiated any charge that Respondents were lackadaisical. While on their way, Williams went over the radio himself, to convey that he arrived at the scene. He was not alone and had an operator with him.

Afterwards, someone came over the radio saying "slow down." Baldino agreed that "slow down" means this is no longer a priority job and you no longer have to take

chances of having an accident by going through red lights. As soon as the situation is under control, officers want to get on the radio and tell everyone else responding to slow down. Baldino did not know who transmitted the order to slow down.

Towards the end of the transmissions, Williams informed the dispatcher that there was no 10-34 there. Baldino agreed that this meant that there is no assault in progress, that it was just a 10-52. Williams did not say that there was an order of protection. Baldino acknowledged that based on Williams' direction over the radio, Respondents would have the impression that Williams was at that scene and handling that job.

When Respondents arrived, Williams gave them instructions. Williams remembered that he had separated the two parties and then interviewed each one of them separately. Then he asked Respondents to wait with one of the parties while he interviewed the other. Baldino agreed that Williams conducted both parts of the investigation. After that, he directed Respondents to write up harassment reports. Baldino agreed that Williams did not tell them to do a further investigation. He did not tell them to make any arrests. He told them what to do and they did it.

Baldino agreed that in his experience as a police officer and a sergeant, the way things come over the radio is not necessarily the way they end up. Sometimes things come over as a homicide and they turn out not to be. It is the police officer's job to investigate and evaluate.

Baldino agreed that if the sergeant was investigating, he might have already asked about whether there was an order of protection and been told there was not. The sergeant might have been shown an expired order of protection. Baldino agreed that any number of things could have happened already during the sergeant's investigation.

When asked why, if Williams told them to write it up as just harassments, would Respondents assume that Williams had not done a proper investigation, Baldino replied, “Well, it's possible that the sergeant didn't hear the order of protection come over as an order of protection if he was responding to a 10-34. And they got there, they already acknowledged in my investigation that they were responding -- they heard that transmission come over as a 52, order of protection.” Baldino then agreed that the sergeant knew initially there was an allegation about an order of protection. While Baldino agreed that it is not Respondents' job to second-guess the sergeant, he noted that in the Patrol Guide, when you believe there is misconduct, you must report it.

Regarding Baldino's comment, the following colloquy ensued:

Q But misconduct would have been -- and stay with me for the example -- if they got there and the sergeant held an order of protection in his hand and said, well, they got an order of protection, but we are not making an arrest here. That would be misconduct, correct?

A Correct.

Q All right; because if there is an order of protection, there has to be an arrest, correct?

A Correct.

Q There are certain orders a sergeant can give you which you know, just from hearing them, are inappropriate, correct?

A Correct.

Q So if a sergeant says, hey, that guy sitting there, shoot him in the head, that would be an inappropriate order, correct?

A Correct.

Q If a sergeant takes money out of a dead body's pocket and starts splitting it and says, here, take your share, that's an inappropriate act, correct?

A Correct.

Baldino agreed that officers are supposed to follow orders if they seem legitimate.

Respondent's attorney asserted that the Department does not teach its officers to second-guess and ask to make sure the sergeant is doing everything right; Baldino replied, “Well, it doesn't, unless he is doing misconduct.”

When asked would they have known in this situation that their sergeant was committing misconduct, Baldino answered, "They know he was taking a harassment report. . . . And there is no order of protection involved. If that order of protection was valid, somebody should have checked it." When asked, since they got there after him, how did they know he did not check it and that he had not already done what he was supposed to do, Baldino said, "When I interviewed them, they said they knew nothing about an order of protection. That's what they said."

Before this incident between Person B and Person A, there had been a previous one, in which Person A obtained an order of protection against Person B. About week after this incident, Person B stabbed Person A in the leg and she was arrested. Baldino believed that the case was still open. When Demchenko made his complaint to IAB, he alleged that he had spoken to Williams. Demchenko received a command discipline for failure to notify Williams that he was a police officer at the scene.

Police Officer Yuriy Demchenko

Demchenko has been a member of the Department for four and a-half years. He has been assigned to the 60 Precinct for two years.

He lives at [REDACTED], in [REDACTED] with [REDACTED]. [REDACTED]

[REDACTED] moved into the [REDACTED] [REDACTED] about ten years ago.

Six years after [REDACTED] moved into the building, Person B moved there. Person B is a man who dresses like a woman. Person B's apartment was right above [REDACTED] apartment. At some point, loud music and banging on the floor started to come from Person B's apartment. The noise began with music, then banging on the floor.

Demchenko said, "Then eventually it was a track of different people going down the stairs during different hours, 4, 5 o'clock in the morning knocking on the doors. A few times, they tried to break our door." He assumed Person B was a prostitute, "Because of all the traffic, different males everyday in and out."

Before December 31, 2009, Person A was assaulted. Person B kicked him in the chest and was arrested that day. Although Person B made allegations against Demchenko, her allegations were never substantiated. Nor was Demchenko ever disciplined by the Department for any allegations Person B made about him.

On December 31, 2009, Demchenko was not working and planned to spend the day with family and friends. He had invited a friend from high school, Person C and his girlfriend, [REDACTED] over for New Year's Eve.

Around 11:00 p.m., he went to meet his girlfriend at the train station. It took him 10 or 15 minutes to do this. When Demchenko returned from the station and entered the lobby, he heard screams from above. He went upstairs to the second floor to [REDACTED] apartment. Then he saw Person A by the door holding his left hand and blood was coming out. [REDACTED] was screaming. He saw Person B running downstairs. On Person A's hand he saw three tiny cuts that looked like they came from a blade. Demchenko testified, "He told me that somebody knocked at the door. He assumed it was me. They open the door. She jumped on top of him. After that, he doesn't remember anything." Person A did not say anything about whether Person B had a blade or any weapon.

Demchenko told Person C to call 911, "Because at that point, I was trying to help Person A and I couldn't find my cell phone." Demchenko did not remember exactly what he told Person C, "but that [REDACTED] got assaulted."

Demchenko confirmed that on December 31, 2009 Person A had a valid order of protection against Person B. Demchenko was not sure whether he himself had also been given an order of protection, but he believed he had. He did not remember whether on December 31, 2009, he had a physical copy of that order of protection.

After Person C called 911, Williams responded on the scene. Williams asked Demchenko exactly what happened, and Demchenko translated for Person A who does not speak English. Demchenko testified, "I told him exactly what Person A told me, that he opened the door, Person B jumped on top of him, and he ended up having slashes, scratches on his hand." Demchenko did not remember whether the order of protection was discussed. Demchenko testified, "I didn't see anybody except the sergeant. I didn't see any other police officer."

As to whether he identified himself to Williams as an off-duty member of the service, Demchenko said, "I believe I mentioned that I worked for NYPD, but I never showed my ID or shield." Demchenko received a command discipline for his failure to identify himself.

On January 2, 2010, Demchenko reported to IAB, "That Person A was assaulted and he had a valid order of protection and the boss didn't do anything." He told IAB that Person A had a copy of the order of protection with him.

On December 31, 2009, Williams told Demchenko, "'It's going to be a harassment.' And I said, 'It's not harassment, it is assault.' And he told me, 'You are not going to tell me what to do. I'm the sergeant and that's it.' He said, 'Nobody is going to get arrested.'" Demchenko confirmed that this conversation took place after 11 p.m. on New Year's Eve.

Demchenko was present on January 23, 2010, when Person B stabbed Person A. Person B was arrested for Assault in the second degree with a weapon and violation of an order of protection.

On cross-examination, Demchenko confirmed that he never saw either one of the Respondents there that day. He called IAB because he felt Williams was acting inappropriately, and [REDACTED] said that "we should do something about it." Demchenko admitted that he felt uncomfortable that [REDACTED] were upset that Person B was not arrested.

Demchenko spoke to Williams in front of the door to his apartment, outside in the hall. Demchenko believed there was a provision in the order of protection that acknowledged that Person B and Person A lived in the same building, but they just could not have contact with each other. Demchenko did not see what happened to cause Person A's hand to bleed. He admitted it could have been a scratch from Person B's fingernails or something like that.

The assault charge, as far as Demchenko knew, was still pending.

Sergeant Maurice Williams

Williams has been a member of the Department for 11 years. He was promoted to the rank of sergeant in November 2009. On December 31, 2009, he was the patrol supervisor in the 61 Precinct. He was actively patrolling in a police car with an operator. As the patrol supervisor, he was monitoring the radio to respond to 911 calls.

On December 31, 2009, Williams responded to a 10-34 at [REDACTED].

When asked if he recalled hearing the dispatcher say that there was a 10-52 order of protection for that location, Williams said, "To my knowledge, I remember a 10-34."

When asked if he recalled the 10-52/order of protection, Williams replied, "After after the fact, yes." He recalled it as his official Department interview.

He believed that Respondents Farah and Diomede, whom he had supervised before, were assigned to Sector George. He listened to radio transmissions between the dispatcher and the sector, but did not recall hearing the dispatcher's transmission of the 10-52 order of protection.

He believed that he was the first to arrive at the [REDACTED] location. He said he "went to the building. I believe we separated both parties." The parties were "an older gentleman [Person A] . . . and a man dressed like a woman [Person B]."

He believed that Person A spoke English and did not have any accent. From what he remembered, Person A "was arguing with his neighbor." Williams said that there was no physical contact between Person A and Person B. He also spoke with Person B, who told him "pretty much the same thing, that they was disputing. I don't remember what the dispute was over."

When Respondents arrived, Williams directed them to take a complaint report from both parties. Williams acknowledged that he was listed as the supervisor on the scene on both complaint reports. Although he responded to a 10 34, the complaints did not mention an assault or physical contact.

When asked if he assessed whether there was physical contact between the parties, Williams replied, "Well, I'm pretty sure we did, yes" and that "there was no

physical contact." He did not see any bleeding on either of the parties. He could not recall seeing any cuts to the hand on either individual.

After the job was completed, Williams resumed patrol. He did not remember exactly what he said to the dispatcher. When asked whether he recalled the dispatcher asking whether the 10 34 and the 10-52/order of protection were one and the same, Williams said, "Yes, after the fact, yes." Williams agreed that he told the dispatcher that the 10 34 and the 10-52 "were one and the same." When asked if he told the dispatcher that there was no 10 52/order of protection involved, Williams conceded, "I probably did. I don't remember."

Williams acknowledged that, as result of this incident, he received charges and specifications for failing to direct the arrest of Person B for violating the order of protection. He pled guilty to the charges and forfeited 18 vacation days.

On cross-examination, Williams confirmed that, whenever and wherever he and police officers are present, Williams is in charge of the situation. The supervisor on the scene is always the one in charge. If a lieutenant shows up, that lieutenant is automatically in charge, and so forth, all the way up to the Police Commissioner.

Williams agreed that when he gives instructions to police officers, everything he tells them to do is an order. He may phrase his order in ways that do not appear to be an order. If for example, he says, "Do me a favor, drive this car to the pound," it is not really a favor, it is an order. If an officer refuses to do something a sergeant tells him, then, Williams said, "It's refusing to do a lawful order." Williams must then "call a duty captain and they will be suspended."

Williams acknowledged that he was a new sergeant on the night of this incident and had only been a patrol sergeant for about a month. This night was New Year's Eve, traditionally a busy night. The closer to midnight, the busier it gets. Right after midnight, it gets really busy. Williams believed that on that evening, he was supervising four different cars with two officers in each car. All of the officers were busy that night.

At some point, the job came over as a 10-34, at [REDACTED]. This was a high priority job that you have to respond to right away. Since the other sectors were all handling jobs at that time, Williams decided to go there himself with his operator, rather than just back up a unit.

He got to the [REDACTED] location before any other members of the service. When he arrived, he began to assess the situation, just as a police officer would do if he had responded first. Williams also maintained contact with the radio dispatcher. He told the units that were responding to slow down. Williams explained this instruction is given because "You don't want anybody getting hurt coming to the location if, like, it's not as dangerous as we thought it was."

Williams agreed that by the time he was interviewed about this incident, which was later on, he did not remember every detail about what happened. He does not remember that much now. He does not remember ever seeing Demchenko on that day. When he came to the scene he saw and separated a male dressed as a female and an older man, in order to interview them. He did not remember seeing any injuries on either one of them. Neither one of them showed him an order of protection. There were no members of the service on the scene who were off-duty. When an off-duty member of

service appears at a scene like that, his responsibilities as a sergeant are to notify the duty captain and be guided by him or her.

After he did the investigation, Williams gave instructions to Respondents, who were working as a team, to fill out a complaint report for harassment for each party that was involved. Based on the Penal Law, you can't make an arrest for harassment unless you witness it. For example, if someone claims to have been pushed by someone else and there was no injury, that would be harassment. If Williams saw it, he could arrest the person for harassment. But he did not see anything happen between the two individuals.

Although he could not make an arrest, he still had to ensure that proper complaint reports were filled out, so he told Respondents to write out cross complaints for harassment.

When asked what he said to Respondents, Williams stated, "I probably said, 'There is no injuries. Take a report from both parties.'" He agreed that he did not ask them, but told them what to do and that it was an order. If they said, "No, we don't feel like it," then, Williams testified, "They would be suspended." He did not expect the officers to say to him, "Hold on, Sarge, let's make sure you did everything you were supposed to do."

He did not remember anyone saying anything about an order of protection while he was on the scene. Williams' experience has been that "pretty often" the classifications that come over the radio turn out to be different.

Williams testified that his plea was his concession that he should have done more to check to see if there was an order of protection.

When asked if he himself thought that Respondents Farah and Diomede, who were working directly under him, did anything wrong, Williams said no.

Respondents' Case

Respondents Farah and Diomede testified in their own behalves.

Respondent Farah

Respondent Farah has been a member of the Department for almost nine years. He has been at his current command, the 61 Precinct, since 2005. Before that he had also worked at the 70 Precinct, the Brooklyn South Task Force and the Coney Island Detail. At the 61 Precinct he normally works the 4:00 p.m. to 12:00 a.m. tour primarily as a patrol officer, in uniform in a marked patrol car. He has made about 70 arrests in his career.

On December 31, 2009, New Year's Eve, he was working 4:00 p.m. to midnight tour at the 61 Precinct, with Respondent Diomede in Sector George. Compared to other days on the job, New Year's Eve is "incredibly hectic because you have a lot of people traveling. Radio runs generally pick up around the midnight part of the tour." This is because "people are getting out, they've been drinking for a while . . ." They received a call to respond to [REDACTED]. He could not remember when that call first came over, but remembered it was a 10-34, an assault in progress. Respondent Farah noted, "Assault in progress means someone's going to get hurt real quick if you do not show up." Respondent Farah did not remember what they were doing when they got the call.

He estimated that the 61 Precinct is about “six and a half square miles; it's one of the bigger precincts in New York City.” They were at least a few miles from that location.

When the two were assigned that job, Respondent Farah “threw the [turret] lights on in the car, started hitting the [siren] button intermittently, and took off.” Respondent Farah was driving that night. When asked whether he was monitoring the radio as he drove to [REDACTED], Respondent Farah replied, “I mean, you try to, but my precinct is I don't know where we rank in terms of accidents, but you really got to pay attention how you -- how you getting to this job because, again, to me, we lead the city, we're at the top of the city, in terms of accidents. . . . So you try to listen to it, but you're really trying to pay attention that you actually get there alive.”

While on their way, they learned the other units were also responding to the same job and then Williams, his patrol supervisor, was at the job.

When Respondent Farah heard that Williams was responding to his job, he thought, “Good, someone's going to back me” When asked if Williams was closer to the job than Respondents, Farah replied, “He must have been because he was there before me.”

The first thing Respondent Farah remembered seeing when he got to the [REDACTED] [REDACTED] location, was Williams' police car. Respondent Farah did not recall whether he had worked with Williams before. When they arrived, Respondent Farah walked over to the address, went into the long hallway and saw their supervisor questioning a male dressed in female's clothing. Respondent Farah said, “I believe he [Williams] was done pretty much with his questioning because he said, ‘Stay here, watch the man dressed as a

woman' and then went upstairs." Respondent Farah "assumed there was somebody else upstairs, another party" and that he was going to do another interview.

About ten minutes later, Respondents heard Williams scream down, "Come up here." He did not sound like he was in distress and just yelled so they could hear him. Respondent Farah walked up the stairs and stepped into "kind of like the front of the apartment." Williams said, "Make two reports for harassment," Respondent Farah explained, "It was a cross-complainant situation."

Respondent Farah understands harassment, as defined by the Department, is "a penal law violation where if it's witnessed in my presence or if I personally witnessed it while in full uniform, you know, just working, I can take action." That is, he could make an arrest. Some examples of harassment Respondent Farah gave: "If somebody hypothetically is walking down the street and they see somebody else and they say 'I'm going to kill you,' I mean, it's a threat. If I was there, I could do something about it. However, if I weren't there, I could make a report for harassment, but it essentially gets closed out because there's no law enforcement who actually witnessed it." If someone pushes somebody else or slaps someone, that is harassment. Respondent Farah agreed that anything below an actual assault is harassment.

Respondent Farah agreed that after Williams had interviewed both parties, he told both Respondent Farah and his partner, Respondent Diomede, to write up a cross complaint report for harassment.

When asked where Respondent Diomede was when Williams instructed them, Respondent Farah replied, "I believe he was behind me, like still in the stairs. I didn't

really go in. I was kind of in the doorway, like inside the apartment in the doorway; you know what I'm saying?"

Upstairs, Williams was with an older couple in the apartment at that time.

Respondent Farah never saw Demchenko that evening. From the time he arrived to the time that Williams gave him instructions, Respondent Farah estimated it was "maybe 15 minutes, 20 minutes."

As he was responding to the [REDACTED] location, Respondent Farah did not remember hearing over the radio about the possible order of protection. Respondent Farah explained:

I remember hearing it when you guys played it here. And if you listen to the audio, the sirens are blaring. Like I said before, I was hitting the sirens intermittently. My precinct is in the top of New York City precincts in terms of accidents. I don't know what number of accidents we're up to yet for this year, maybe my partner knows; but we're four months into the year, and we've had hundreds of accidents.

Respondent Farah agreed that concentrating on driving, trying to get to the location quickly, and using the radio and the siren may be why he did not hear all the transmissions.

When asked what he is supposed to do if something comes up as an order of protection violation, Respondent Farah said, "I would have taken the piece of paper I would have asked about it. They would have given me piece of paper; I would have looked at the piece of paper, would have seen what -- you know, when it was signed off on, when it was served, when is the date when it would expire, and what the actual order itself would entail." While Respondent Farah was on the scene, no one, including Williams and both the complainants, ever mentioned an order of protection to him.

Respondent Farah was asked if he felt that Williams was giving him an order when Williams told Respondent Farah and his partner to write up a cross-complaint harassment. Respondent Farah replied, "When your supervisor tells you to do something, you do it." Respondent Farah denied that it occurred to him say then, "Hey, Sarge, did you check to see if there's an order of protection in this case?"

When asked if he is trained to second guess instructions by a sergeant, Respondent Farah replied, "Negative. You do not ask -- you don't question your supervisor. It would be the same thing if you go to the judge and question the judge, you know, I wouldn't do that." In any event, he never felt Williams was doing something wrong. Respondent Farah did not know what steps Williams had taken before Respondent Farah arrived on the scene. Respondent Farah was not with Williams for either his interview of Person B or the Demchenkos.

Respondent Farah testified that his partner wrote up both of those cross complaints. The reason, Respondent Farah explained, that he did not arrest anyone that night was "because I at no point knew that there was an order of protection or that there was any reason for arresting anyone."

On cross-examination, Respondent Farah said that when he first arrived, he saw Williams talking to Person B for about two minutes. Respondent Farah was about four or five feet away from Williams when he saw him talking. He guessed that Respondent Diomede was also standing "within five feet of Williams, but did not know exactly where. Respondent Farah did not remember what Williams discussed with Person B.

When Williams went upstairs, Respondent Farah did not know whether anyone had been searched or whether there were any weapons involved. When Williams called

for the two to come up, Respondent Farah did not know how far up his partner climbed the stairs. Respondent Farah believed that Person B remained downstairs. Respondent Farah did not see any other members of the service present in the lobby with Person B when he and Respondent Diomede went upstairs. Respondent Farah assumed at this point that Person B was involved in the 10 34 that had originally been called over the radio. When asked if the two of them left Person B in the lobby, Respondent Farah asserted, "Like I said, I don't know how far up my partner went, maybe he was still watching."

Respondent Farah thought that when he first got to the top of the stairs, Williams was inside the apartment. Respondent Diomede was behind Respondent Farah. Respondent Farah did not go far inside the apartment.

Respondent Farah did not remember "word for word" the conversation he had with Williams inside the apartment. Respondent Farah did not remember whether, after Williams told them to take the reports for harassment, Williams went anywhere.

After looking at the reports, Respondent Farah stated that he did not think that his handwriting was on either of them. When asked whether the handwriting was a little different in each document, Respondent Farah responded, "I don't know. I don't really analyze handwriting. I guess. I don't know." Respondent Farah reconfirmed that he did not write the details section in either one of the documents. Respondent Farah did not know where the complainant reports were prepared. He did not know whether Williams was inside the apartment when the reports were prepared.

Respondent Farah did not recall having a conversation with Person B. Respondent Farah said his partner probably obtained Person B's date of birth. When Respondent Diomede was speaking to Person B, Respondent Farah was probably somewhere around him.

Respondent Farah did look at Person B and Person A to see if they were injured; he saw that "nobody was injured."

Respondent Farah did not know what he was doing while Respondent Diomede prepared the complaint reports or even if Respondent Diomede prepared the reports at the location. Generally the recorder is the one who asks questions and prepares the report. Respondent Farah did not remember where he was when his partner was speaking to either of the parties.

Respondent Farah did not remember if he asked anyone if they were injured. When asked if that question would ordinarily be asked when responding to an assault in progress, Respondent Farah stated, "You can generally tell. When you actually get 84 to the job and you see that, you know, there's no wounds on the person, like, you can pretty much visually see." When asked how he makes that assessment, Respondent Farah explained, "No, no. I'm not saying that you know a hundred percent with something like this, but right off the bat you generally see, like, you know, if someone has their face cut open or they're cut, they're shot . . ."

Respondent Farah agreed that often each party has a different version of what happened and both versions would be important to document.

When he was responding to this 10 34, Respondent Farah had his sirens activated intermittently. There is always activity on the radio; Respondent Farah conceded, "You would like to be cognitive of everything going on around you; that, too, includes the radio." He acknowledged, "I would try to be attentive to the transmissions when they give them to me." He admitted that he could have asked the dispatcher to repeat the

transmission. He agreed that telling the dispatcher "10-4" is an acknowledgement of the transmission by the sector.

On redirect examination, when asked whether Williams told them to write up two cross-complaints or did he say to investigate this matter, Respondent Farah said, "No, he said take two cross-complaint reports [for harassment]." Respondent Farah believed that the sergeant's talking with Person B and then going upstairs to talk to Person A constituted the investigation. When Williams told Respondent Farah and his partner to write up the case as cross-complaints for harassment, Williams did not say, "Ask more questions."

If Respondent Farah had responded to the scene and Williams was never there, he said, "I would have done my investigation." That would have entailed "asking them what exactly happened, what was going on, what's the background, if there's a background." He did not ask those questions because Williams had already done that.

Respondent Diomede

Respondent Diomede has been a police officer for almost nine years. He has been at his current command the 61 Precinct since 2005. Before that he was assigned to the 70 Precinct and then Patrol Borough Brooklyn South Task Force. Currently he is a patrol officer. He has made 170 arrests in his career.

Regarding New Year's Eve 2009, Respondent Diomede testified similarly to Respondent Farah with the following added details and exceptions.

When Respondents arrived at the [REDACTED] location, Respondent Diomede did not remember seeing another police officer there. Williams did not tell Respondents to cuff Person B. When asked what he understood Williams' direction "stay

here with Person B" to mean, Respondent Diomede answered, "Oh, just watch her. We're trying to figure out what's going on to see if we actually have a crime, you know." Respondent Diomedes also felt that Williams was investigating the dispute. When Williams went upstairs, his operator went with him. He believed that Williams went up the stairs one floor. Both Respondents went upstairs when Williams told them to do so. Williams did not tell them to keep Person B in custody while she was still downstairs in the lobby.

When Respondent Diomede got upstairs, he remained on the staircase. From there, he saw Williams and Respondent Farah, who was in front of him, and an older man. Respondent Diomede never went into the apartment.

When Williams told them both to write the reports, Respondent Diomede did it since he was the recorder. Williams would not necessarily have known which one of them was the operator or recorder.

Respondent Diomede did not attempt to do his own investigation into what had happened on that day. When asked how he wrote up these complaints, he replied, "I would have gotten their information. I would have talked to the sergeant about it. And if I overheard anything, that's how I would have gotten most of the information."

Respondent Diomede also said, "I would have wrote it either in my book to write it later, or I would have actually written on the actual complaint report." He could not remember when he wrote up those complaint reports.

When they were on their way to the job, Respondent Diomede did not remember hearing anything about an order of protection. When taking the reports, he never asked either of the complainants if there was an order of protection because he assumed

Williams had already done this. When asked whether Williams told him to investigate this case or just generate the report, Respondent Diomede replied, "He just said that, 'Just make the two complaint reports.'"

In Respondent Diomede's experience, sergeants do not write up their own harassment reports or make arrests. When Williams told them to take the reports, Respondent Diomede considered that an order. Williams never said, "Look, I'm busy, can you investigate this further?" Respondent Diomede believed that Williams had properly investigated this case because "he was the sergeant. He's the supervisor. He controls that scene." Respondent Diomede had no reason to doubt what Williams was doing or to think he was doing something wrong. Because of the relationship between police officer and sergeant, he would never say, "Wait a minute, Sarge, let me ask you, did you do this, did you do that"? Respondent Diomede explained, "It's just not done. We don't do -- there's no reason for me to have done it. And you wouldn't do it even if you -- you know, you just don't do it; he's your supervisor." The chain of command in a paramilitary organization discourages questioning the orders of your superiors. Respondent Diomede explained that if he did not do what the sergeant told him to do, he might get suspended.

On cross-examination, it was determined that the complaint by the victim Person A was prepared by Respondent Diomede. Respondent Diomede stated that the details box, where the incident is described, contained his handwriting. When asked if the same box in the cross-complaint by the victim Person B contained his handwriting, Respondent Diomede said, "It looks different from mine." When asked again if this handwriting was

not his, he confirmed, "I would say no. It looks like the rest of the report is, but -- unless I was rushing, I don't know."

Respondent Diomede reiterated that he was the one who prepared both complaint reports. He believed that he completed both of them. However, he conceded that in the report where Person B is the complainant, the detail box was not prepared by him. When asked who else could have prepared the details on that 61 other than himself, he replied, "My partner." But he was not familiar with Respondent Farah's handwriting. When asked again if this was Respondent Farah's handwriting, Respondent Diomede replied, "I don't know for sure but, you know, it could be."

Both complaint reports were submitted to the desk officer back at the command. After looking at the complaint reports, Respondent Diomede confirmed that the desk officer was Sergeant Jackson. Respondent Diomede did not recall whether Jackson asked him what happened, whether anyone was injured, or whether there was an order of protection.

Respondent Diomede acknowledged that it was his voice communicating with the dispatcher on the radio transmission that was played at trial. He also recognized his voice transmitting a 10-4 acknowledgment to the dispatcher's transmission of a "10-52, order of protection."

When Williams told Respondents to "come up here," Respondent Diomede said he "was in the stairwell between the first and the second floor or it was the second and the third, I can't remember." When asked about how many stairs there were, Respondent Diomede guessed, "12, 17, I don't know." In response to whether he was closest to the top of the stairs or to the bottom of the stairs, he said, "I was closer towards the top of the

stairs." During this time, Person B was in the corridor leading to the stairs. Respondent Diomede believed that there were other members of the service downstairs in that lobby before they went upstairs, but did not recall who they were. When asked if he was certain there was another member of the service downstairs with Person B then, he replied, "I don't believe -- I don't believe I would have left her by herself." However, Respondent Diomede did not recall if there other members of the service downstairs in that lobby when he went upstairs.

When Respondent Diomede first came up the stairs, he was "pretty sure" that Williams was "right outside the doorway." He did not recall what Williams said. At one point, William went inside the apartment. After Williams said to prepare cross-complaints for harassment, Williams did not remain inside that apartment and walked outside the building. After Williams left, Respondent Diomede did not see him again there.

When Respondent Diomede prepared the two complaint reports, he had to get information from both individuals who were the victims of the cross-complaints. This meant asking their names, dates of birth, addresses, and phone numbers. The complaint report is a four-page document and there is a lot of information that needs to be filled out on it.

When asked how he got Person A's information, Respondent Diomede described, "I would have, at that point, probably heard everything that was going on between the sergeant and PersonA I was listening to them talk, so I would have heard." But Respondent Diomede did not hear Williams ask Person A for his date of birth

or his cell phone number; Respondent Diomede would have asked for it himself.

From looking at the report Respondent Diomede assumed Person A spoke English.

He also had to record Person B's date of birth, her height, her weight, race, hair color and length, and eye color.

Respondent Diomede assumed the complainants were acquaintances "probably from overhearing him [Person A] talking with the sergeant or from Person A -- I mean, from Person B or Person B himself."

Respondent Diomede made the assessment that no physical force was used from overhearing the conversation, but did not recall specifically what was said between Williams and Person A. Respondent Diomede did not see any injuries to Person A's hand, but did not recall ever looking at Person A's hand.

When asked by the Court how, when he first saw Williams speaking to Person B, that he knew Williams was finishing, Respondent Diomede replied, "His gestures, his motion, and then he just walked up the stairs." When asked how he wrote what Person B said if he did not hear the whole conversation, he explained, "Because Person B -- Person B was probably talking to me in the hallway; so I just wrote it down." When asked what Person B told him, Respondent Diomede said, "I don't recall."

FINDINGS AND ANALYSIS

Respondent Farah and Respondent Diomede are both charged with failing to arrest an individual for a violation of an active Kings County Criminal Court Order of Protection on December 31, 2009, at a location on [REDACTED], in Kings County.

This incident came to the Department's attention when Police Officer Demchenko complained to the Internal Affairs Bureau. Person A, Demchenko's [REDACTED], had an order against Person B from a past assault. Demchenko complained that Sergeant Williams failed to arrest Person B for violating the order of protection. Demchenko testified that he did not see or speak with Respondents. A week later, Person B stabbed Person A in the leg. Person B was arrested and, at the time of this hearing, assault charges against her were still pending.

The Department's investigation of Demchenko's complaint led to Williams pleading guilty to failing to direct the arrest of Person B for violating the order of protection. This plea was approved by the Police Commissioner and Williams forfeited 18 vacation days. The investigation also led to Demchenko receiving a command discipline for failing to identify himself as a member of the service.

The Department argued that both Respondents heard the radio calls for an assault in progress and that there was an order of protection involved. Respondent Diomede admitted that he acknowledged over the radio that he heard the dispatcher's transmission for "10 52, order of protection." When Respondents arrived at the scene, the Advocate maintained, Respondents should have told or reminded their superior about the order of protection. The Advocate also asserted that, while they were taking the complaints for harassment, Respondents should have asked both parties questions, ascertained that there was an order of protection and then informed their sergeant.

Respondents' attorney argued that based on what the Respondents heard over the radio, they could presume that their sergeant was handling the job. After Respondent Diomede acknowledged the order of protection, Respondents heard over the radio that

Williams arrived at the scene. Then they heard the transmission, "Slow down." The Respondents understood this to mean that they no longer needed to get to the job immediately. Williams called out that the job was not an assault, but a dispute. When the radio dispatcher asked if this assault was the same job as the dispute with the order of protection, Williams said, "They're one and the same."

Respondent's attorney also elicited from Sergeant Baldino, the Department's investigator, that a classification of a crime over the radio may not be what the police discover when they arrive on the scene and investigate.

When Respondents arrived at the scene, their sergeant was concluding his interview of Person B. Williams told them to wait with Person B while he went upstairs to interview Person A. About ten minutes later, Williams yelled for Respondents to come upstairs. He told them to prepare complaint reports for harassment and then left.

Although the Department argued that Respondents should have learned about the order of protection when they filled out the complaint reports, the Department did not charge Respondents with failing to properly fill out the complaint reports.¹ The only Patrol Guide section the Department cites in its charge, 208-36, Page 4, Paragraph 7, relates to family disputes, where asking about an order of protection is mandatory. However, the dispute between Person B and Person A was not a family dispute.

In *Case No. 4888 11*, p. 18 (December 31, 2012), the Court noted that there is no requirement that a police officer speak directly to a complainant before preparing a complaint report. In this case, no evidence was presented that Respondents heard or were told anything by either of the complainants about an order of protection. Nor did the

¹ Nor did the Department charge Respondents or the sergeant with failing to arrest Person B for assault.

Department cite any rule that would require Respondents to have re-interviewed the complainants or to duplicate their superior's work. The sergeant is usually called to the scene to check the officers' work afterward, not the other way around.

Williams took responsibility for this incident when he pled guilty to failing to direct Respondents to arrest Person B. Williams testified that he initiated his own investigation and did not believe Respondents had done anything wrong by following his orders. If Respondents did not follow his order, he indicated that they would be facing suspension. Here the responsibility lies with the sergeant, who failed to give the appropriate order, *Case No. 4888-11, supra*.

Certainly if Respondents had asked and learned about the order of protection, that would have been helpful. However, the officers did not have any reason to believe that the sergeant had not conducted the investigation as it should have been conducted. Therefore, Respondents are found Not Guilty.

APPROVED
JUL 22 2012
Raymond W. Kelly
RAYMOND W. KELLY
POLICE COMMISSIONER

Respectfully submitted,



Amy J. Porter
Assistant Deputy Commissioner - Trials